IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-623

SHARON ROGERS,
Petitioner

vs.

FRANCIS LOUGH,
Magistrate for Wetzel County,
West Virginia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
WEST VIRGINIA SUPREME COURT OF APPEALS

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Petitioner Sharon Rogers respectfully requests the Court to issue a Writ of Certiorari to review the judgment of the West Virginia Supreme Court of Appeals entered July 10, 1978 denying her petition for a writ of prohibition directed against a criminal prosecution pending before Respondent, a lay magistrate.

OPINION BELOW

The order of the West Virginia Supreme Court of Appeals denying petitioner's petition for a writ of prohibition to Respondent, one justice dissenting, is unreported. It is attached as Appendix A.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered July 10, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).[1/]

1/ The denial of a petition for a writ of prohibition divesting a magistrates Court of criminal jurisdiction by the State's highest Court is a final order appealable to this Court under 28 U.S.C. §1257(2)(3), because a writ of prohibition attacking the jurisdiction of a court is a separate suit from that contemplated by the court to which the writ is sought to be applied and produces a final order under section 25 of the Judiciary Act (which parallels 28 U.S.C. §1257 in all relevant respects). Weston vs. Charleston, 27 U.S. 441 (1829)

(fn. 1/con't)

(Chief Justice Marshall). In Weston, as in the present case, the request for the writ was based upon the alleged constitutional invalidity of a state statute. The Court held that it was of no importance that the Constitutional challenge could be raised along with the underlying action in the lower Court. 27 U.S. 441 at 469. Weston remains controlling authority. The Court more recently held that, where a plaintiff sought a writ of prohibition to prevent a probate Court from taking jurisdiction of condemnation proceedings on the ground that the statutory authority for the action violated the Fourteenth Amendment, the denial of the request by the state's highest court was a final order. Mount Vernon-Woodbery CottonDuck vs. Alabama Interstate Power, 240 U.S. 36 (Holmes, J.). See Madruga vs. Superior Court, 346 U.S. 556 (1954) (construing 28 U.S.C. 1257); Bandini Petroleum Company vs. Superior Court, 284 U.S. 8; Missouri vs. Taylor, 266 U.S. 200 (1924). The fact that the underlying action in this case is criminal does not affect the result. Rescue Army vs. Municipal Court, 331 U.S. 549 (1947).

QUESTION PRESENTED

Whether the rule of North vs. Russell, 427 U.S. 328 (1976), which holds that a criminal defendant is not deprived of liberty without due process of law or effective assistance of counsel by a first tier trial before a non-law trained judge when the defendant can painlessly obtain trial de novo before a law trained judge by standing mute or pleading guilty, extends as well to states which require the defendant to contest guilt at the first tier in order to obtain the right to trial de novo before a law trained judge.

STATUTORY PROVISIONS INVOLVED 2/

United States Constitution, Amendments Six and Fourteen. West Virginia Annotated Code, Sections 50-1-4, 50-2-3, 1978. Supplement.

STATEMENT OF THE CASE

Petitioner was arrested under two warrants executed by Respondent on June 11, 1978 charging her with assault and battery and trespass. They are attached as Appendix C. Both charges are misdemeanors. West Virginia has a two tier trial system for misdemeanors. The first tier is presided over by magistrates who do not have to be lawyers. The West Virginia Supreme Court of Appeals has consistently sustained such trial by lay magistrates over federal constitutional objection. See, e.g.,

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2/ Attached as Appendix B under Rule 23(d).

State ex rel. Moats vs. Janco, 154 W.Va. 887, 180 S.E.2nd 74 (1971). In order to gain a trial before a lawyer judge, petitioner would have to stand trial in magistrates' Court. Petitioner could not shorten her ordeal in Magistrates Court by pleading guilty or standing mute. Guilty pleas at the first tier terminate the case before the second tier can be reached. See Batey and Fuller, Streamlining Criminal Procedure in Magistrates' Court, 79 W.Va.L.Rev. 339, 346 (1977).

Before trial, petitioner petitioned for a writ of prohibition from the Supreme Court of Appeals, which has original jurisdiction to entertain discretionary writs 3/. Petitioner, proceeding pro se, sought to prohibit respondent, who is a non-lawyer Magistrate, from assuming jurisdiction over petitioner's pending trial on the ground, inter alia, that she would be "deprived of the due process of law guaranteed by the Constitution of the ... United States of America." The Court denied the writ, Justice Harshbarger dissenting, but granted sua sponte a ninety day stay of the judgment to permit review in this Court.4/

3/ The petition is attached as Appendix D.

4/ The stay order is attached as Appendix E.

REASONS FOR GRANTING THE WRIT

THE CASE INVOLVES AN ISSUE OF GREAT IMPORTANCE LEFT OPEN BY THE COURT'S RECENT DECISION IN NORTH vs. RUSSELL, 427 U.S. 328 (1976).

At least twenty eight states provide trials before non-lawyer judges. North vs. Russell, 427 U.S. 328 at 333, n.4 (1976). In North, the Court sustained the Kentucky scheme, which had a first tier of lay magistrates and a right to trial de novo before a law trained judge, over Sixth and Fourteenth Amendment attack. Crucial to the Court's decision was the fact that Kentucky permitted a defendant to plead guilty at the first tier and, upon assertion of the right to trial de novo, to bear no consequences of that plea-- a painless bypass. (427 U.S. 337). In addition to West Virginia, at least four other states do not allow defendants to painlessly by-pass the first tier trial before non-lawyer judges.5/ In each of these five states misdemeanor defendants are forced to bear the financial, emotional and temporal burdens of

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5/ Young vs. Konz, 558 P.2nd 791 (Wash. Supr. enbanc 1977); State vs. Duncan, 238 S.E.2nd 208 (S.C.Supr. 1977); Treiman vs. State ex rel. Miner, 343 So.2nd 819 (Fla. Supr. 1977); Palmer vs. Superior Court, 114 Ariz. 279, 560 P.2nd 797 (1977).

a useless first trial before a lay judge.

Unless North is expressly limited those states which presently allow some form of by-pass to the second tier are free to abandon those practices and funnel everyone through the first tier. This could be done with the intent or result that those defendants with either marginal defenses or limited financial and emotional resources will forego the second trial. This would, of course, save those states the costs of providing everyone at sometime all of their constitutional rights. But it is patently unfair to cut costs by placing substantial impediments upon a criminal defendant's ability to exercize her constitutional rights.

THE ISSUES PRESENTED HAVE NOT BEEN DECIDED BY THIS COURT.

There are two components to petitioner's due process claim that she has a right to be heard before a lawyer judge in the first instance where she does not have unrestricted access to a trial de novo presided over by a lawyer judge. Neither of these components have been settled by this Court's most recent decisions concerning the applicability of constitutional safeguards to the first tier of a two tier state trial system. North vs. Russell, 427 U.S. 328 (1976); Ludwig vs. Massachusetts, 427 U.S. 618 (1976). The Sixth Amendment right to effective assistance of counsel confers the right to be tried before a lawyer-judge. See North vs. Russell, 427 U.S. 328 at 342, 343

(Stewart. J. Dissenting); Gordon vs. Justice Court, 12 Cal.3rd 323, 115 Cal. Rptr. 632 (1974). This issue was not adversely decided by North. In North, the court, after setting forth the same argument, said "in the context of the Kentucky procedures...it is unnecessary to reach the question..." North supra at 334.

Assuming a constitutional right to a trial before a lawyer judge at either trial stage, under present West Virginia statutes and procedure one must be afforded this right in magistrates' court. North and Ludwig, when read together seem to stand for the proposition that a state can forego extending some constitutional rights at the first tier where the defendant has painless access to those constitutional rights at the second tier.

In North, this court upheld Kentucky's system because defendants are not prejudiced by it. They can assure themselves a trial presided over by a lawyer-judge by either appealing from a verdict of conviction at the first level or by pleading guilty at the first level and proceeding directly to the second level. The ability to totally by-pass the first tier by pleading guilty seemed to be the dispositive factor. The court cited Colten vs. Kentucky, 407 U.S. 104 (1972) a number of times in support of this contention. North, supra, at 335, 336, 337.

The importance of the ability to bypass the first tier was underscored in Ludwig vs. Massachusetts, 427 U.S. 618

(1976). In Ludwig the defendant was denied a jury trial at the first level. In light of Duncan vs. Louisiana, 391 U.S. 145 (1968) the court was squarely faced with the issue of when if ever may a state deny a constitutional protection to a defendant at the first trial level. The court upheld the Massachusetts procedure because while "unlike the two-tier Kentucky system under consideration in Colton vs. Kentucky, supra, an accused in Massachusetts does not avoid trial in the first instance by pleading guilty, nevertheless he achieves essentially the same result by an established informal procedure known as 'admitting sufficient findings of fact...' The procedure is used if the defendant wishes to waive a trial in the District Court and save his rights for a trial in the Superior Court on the appeal." 427 U.S. 621.

Under current West Virginia law, there is no way for a defendant in a misdemeanor prosecution to by-pass trial in magistrates' court. Unlike parties in a civil suit, the criminal defendant has no right of removal. West Virginia Code Ann. §50-4-8 (Cum. Supp. 1976). He may not avoid a trial in magistrates' court by pleading guilty and then exercise his right to a trial de novo. The West Virginia Supreme Court of Appeals has repeatedly stated that there is no right to appeal from a verdict rendered upon a plea of guilty. Batey & Fuller, Streamlining Criminal Procedure in Magistrates Court, 79 W.Va.L.Rev. 338 at 346 (1977); State vs. Stone, 101 W.Va. 53, 131 S.E. 872 (1926); Nicely vs. Butcher, 81 W.Va. 247,

94 S.E. 137 (1917); Accord State ex rel. Wright vs. Boles, 149 W.Va. 371, 141 S. E.2nd 76 (1965)." Likewise, a West Virginia misdemeanor defendant may not take advantage of an informal by-pass procedure like the one approved in Ludwig. Such an established informal procedure simply does not exist in West Virginia. Consequently, the defendant in Magistrates' court most suffer a full trial in that court before he is granted access to the circuit court" Batey and Fuller supra at 347.

THE STATE COURT ORDER IS IN CONFLICT WITH THE CURRENT TREND OF SUPREME COURT DECISION.

The rationale of Gideon and Argersinger plainly mandates that "the judge conducting the trial will be able to understand what the defendant's lawyer is talking about...and a lawyer for the defendant will be able to do little or nothing to prevent an unjust conviction In a trial before such a [lay] judge, the constitutional right to the assistance of counsel thus becomes a hollow mockery..." North vs. Russell, 427 U.S. 328 (1976) (Stewart J., Dissenting). Ludwig comes close to recognizing the injuries posed by West Virginia practice. "The question remains whether it (informal by-pass procedure) unconstitutionaly burdens the exercise of that right: (1) By imposing the financial cost of an additional trial...and (3) by imposing the increased psychological and physical hardships of two trials" 427 U. S. 618 at 626. The majority termed these

burdens "not unreal and...in an individual case, [may] impose a hardship" 427 U.S. 618 at 626. To five justices of this Court this burden was not unconstitutional because of the informal by-pass procedure. Mr. Justice Stevens, speaking for four justices in dissent, articulated another substantial burden which is applicable to petitioner. "We must also recognize the likelihood that some jurors at the second tier trial will be aware of the first conviction. Such awareness inevitably compromises the defendant's presumption of innocence. Moreover, a judge's instructions cannot adequately avoid this risk of prejudice without creating the additional risk of letting other jurors know about the first conviction" 427 U.S. 618 at 637.

Finally, the state can offer no significant legitimate interest that is served by forcing the defendant to stand one trial merely to have it wiped away when he exercises his appeal of right. "The only reason I can perceive for not allowing such a waiver illustrates the vice of the system. A defendant who can afford the financial and psychological burden of one trial may not be able to withstand the strain of a second. Thus, as a pratical matter a finding of guilt in the first tier proceeding will actually end some cases that would have been tried by a jury if the defendant had the right to waive the first tier proceeding" 427 U.S. 618 at 634, 635 (Stevens J., Dissenting) See generally Batey and Fuller, Streamlining Criminal Procedure in Magistrate Court, 79 W.Va.L.Rev. 339, 346-352 (1977).

CONCLUSION

A writ of certiorari should be issued to review the judgment below.

Respectfully Submitted,

Michael E. Geltner

Larry J. Ritchie

Attorneys for Petitioner

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APPENDICES

App. A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of July, 1978, the following order was made and entered, to-wit:

State of West Virginia ex rel. Sharon Rogers
vs. Prohibition
Francis Lough, Magistrate for Wetzel County, West Virginia

On a former day, to-wit, January 23, 1978, came the petitioner, Sharon Rogers, pro se, and presented to the Court her petition with certificate of service, and note of argument in support thereof, praying for a writ of prohibition to be directed against the respondent, Francis Lough, Magistrate of Wetzel County, West Virginia, as therein set forth. Upon consideration whereof, a majority of the Court is of opinion that a rule should not be awarded, and the prayer of the petition is therefore denied. Justice Harshbarger would grant. Justices Harshbarger and McGraw would grant a ninety day stay under the provisions of Code, 58-5-31, as requested in oral argument.

A True Copy

Attest: /s/ George Singleton
Clerk Supreme Court of Appeals

App. B

§50-1-4. Qualifications of magistrates; training; oath; continuing education; time devoted to public duties.

Each magistrate shall be at least twenty-one years of age, shall have a high school education or its equivalent, shall not have been convicted of any felony or any misdemeanor involving moral turpitude and shall reside in the county of his election. No magistrate shall be a member of the immediate family of any other magistrate in the county. In the event more than one member of an immediate family shall be elected in a county, only the member receiving the highest number of votes shall be eligible to serve. For purposes of this section, immediate family means the relationship of mother, father, sister, brother, child or spouse. Notwithstanding the foregoing provisions of this section, each person who held the office of justice of the peace on the fifth day of November, one thousand nine hundred seventy-four, and who served in or performed the functions of such office for at least one year immediately prior thereto shall be deemed qualified to run for the office of magistrate in the county of his residence.

No person shall assume the duties of magistrate unless he shall have first attended and completed a course of instruction in rudimentary principles of law and procedure which shall be given between the date of election and the beginning of the magistrate's term in accordance with the

supervisory rules of the supreme court of appeals.

All magistrates shall be required to attend such other courses of continuing educational instruction as may be required by supervisory rule of the supreme court of appeals. Failure to attend such courses of continuing educational instruction without good cause shall constitute neglect of duty. Such courses shall be provided at least once every other year. Persons attending such courses outside of the county of their residence shall be reimbursed by the State for expenses actually incurred not to exceed thirty-five dollars per day and for travel expenses at the rate of fifteen cents per mile for one round trip.

Each magistrate shall, before assuming the duties of office, take an oath of office to be administered by the circuit judge of the county, or the chief judge thereof if there is more than one judge of the circuit court. Each magistrate shall maintain the qualifications for office at all times.

Each magistrate who serves five thousand or less in population shall devote such time to his public duties as shall be required by rule or regulation of the judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court. Each magistrate who serves more than five thousand in population shall devote full time to his public

duties. As nearly as practicable the work load and the total number of hours required shall be divided evenly among the magistrates in a county by such judge. (1976, c.33.)

§50-2-3. Criminal jurisdiction.

In addition to jurisdiction granted elsewhere to magistrate courts or a justice of the peace, magistrate courts shall have jurisdiction of all misdemeanor offenses committed in the county and to conduct preliminary examinations on warrants charging felonies committed within the county. A magistrate shall have the authority to issue arrest warrants in all criminal matters, to issue warrants for search and seizure and, except in cases involving capital offenses, to set and admit to bail.

Magistrate courts shall have the jurisdiction of violations of subsection(c), section four hundred one [§60A-4-401], article four, chapter sixty-A of this Code under the provisions of section four hundred seven [§60A-4-407] of such article, and may discharge the defendant under the provisions of section four hundred seven of said article four. The exercise of such jurisdiction shall not preclude the right of the accused to petition the circuit court of the county for probation under the provisions of section four [§62-12-4], article twelve, chapter sixty-two of this Code. (1976, c.33.)

INFORMATION FOR WARRANT

State of West Virginia, Wetzel County, to-wit:

Judith Hess complains that on the 11th day of June, 1978, and prior to the making of this complaint, in the County of Wetzel and State of West Virginia, Sharon Rogers did unlawfully in and upon one Judith Hess an assault did make and her, the said Sharon Rogers, did then and there unlawfully beat, bruise, and wound and ill-treat, and other wrongs to her then and there did, to the great damage of the said Judith Hess against the peace and dignity of the State.

The said Judith Hess therefore prays that the said Sharon Rogers may be apprehended and held to answer the said complaint and be dealt with in relation thereto as the law may require.

/s/ Judith Hess

Subscribed and sworn to before me, this 12th day of June, 1978.

/s/_____
Magistrate

A & B -

WARRANT FOR ARREST

Case No. 78-M-292

State of West Virginia, Wetzel County,

to-wit:

To Any W. Va. Law Enforcement Officer:
Whereas, Judith Hess has this day made complaint and information on oath before me Francis B. Lough, a Magistrate in said County, that Sharon Rogers, 317 Foundry Street, New Martinsville, W.V., Defendant did commit a Misdemeanor, in that the said Defendant on the 11th day of June, 1978, and prior to the issuance of this warrant, in said County did unlawfully in and upon one Judith Hess an assault did make and her, the said Sharon Rogers, did then and there unlawfully beat, bruise, and wound and ill-treat, and other wrongs to her then and there did, to the great damage of the said Judith Hess--against the peace and dignity of the State

Therefore, we command you in the name of the State of West Virginia, forthwith to apprehend the said Sharon Rogers, and bring that person before me or before some other magistrate in said County, to answer said complaint, and to be further dealt with in relation thereto according to law.

Given under my hand this 12th day of June, 1978.

/s/_____
Magistrate

Executed By: /s/ Lind Adams, 6/12/78: in Wetzel County

App. C

INFORMATION FOR WARRANT

State of West Virginia, Wetzel County, to-wit:

Sarah L. Powell complains that on the 11th day of June, 1978, and prior to the making of this complaint, in the County of Wetzel and State of West Virginia, Sharon Rogers did unlawfully defy an order to leave property owned by Sarah L. Powell, personally communicated to her by Sarah L. Powell thus committing tresspass on Sarah L. Powell's property other than a structure or conveyance in violation of Chapter 61 Article 3b Section 3 of W. Va. Code as amended against the peace and dignity of the State.

The said Sarah L. Powell therefore prays that the said Sharon Rogers may be apprehended and held to answer the said complaint and be dealt with in relation thereto as the law may require.

/s/ Sarah L. Powell

Subscribed and sworn to before me, this 12th day of June, 1978.

/s/
Magistrate

Tresspass - 61-3B-3

WARRANT FOR ARREST

Case No. 78-M-291

App. C

State of West Virginia, Wetzel County to-wit:

To Any W. Va. Law Enforcement Officer:

Whereas, Sarah L. Powell has this day made complaint and information on oath before me Francis B. Lough, a Magistrate in said County, that Sharon Rogers, 317 Foundry Street, New Martinsville, W. Va., Defendant did commit a Misdemeanor, in that the said Defendant on the 11th day of June, 1978, and prior to the issuance of this warrant, in said County did unlawfully defy an order to leave property owned by Sarah L. Powell, personally communicated to her by Sarah L. Powell thus committing tresspass on Sarah L. Powell's property other than a structure or conveyance in violation of Chapter 61 Article 3b Section 3 of W. Va. Code as amended against the peace and dignity of the State

Therefore, we command you in the name of the State of West Virginia, forthwith to apprehend the said Sharon Rogers, and bring that person before me or before some other magistrate in said County, to answer said complaint, and to be further dealt with in relation thereto according to law.

Given under my hand this 12th day of June, 1978.

/s/
Magistrate

Executed by: /s/ Lind Adams, 6/12/78: In Wetzel County

IN THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex
realtor, Sharon Rogers,
Petitioner

vs. Case No._____

FRANCIS LOUGH, Magistrate
for Wetzel County, West
Virginia,
Respondent

PETITION FOR A WRIT OF PROHIBITION

Now comes the petitioner, in propina persona, and files this her petition for a writ of prohibition against Francis Lough, Magistrate for Wetzel County, West Virginia, the respondent. Petitioner assigns as her grounds the following:

1. On or about June 12, 1978, petitioner was arrested and charged with the offenses of assault and battery and criminal trespass.

2. Petitioner has valid constitutional defenses to the alleged criminal offenses.

3. The respondent is not a member of the bar of the State of West Virginia or licenses to practice law in any other state. The respondent has received no formal legal education.

4. If the trial of the foregoing criminal offenses is permitted to continue the petitioner will be deprived of the due process of law guaranteed by the Consti-

tution of the State of West Virginia and the United States of America, because respondent is unqualified to administer the same.

Wherefore, petitioner prays for the entry of an Order prohibiting the respondent, or any other person, who is not a member of the bar of the State of West Virginia or who has not received a formal legal education, from proceeding with the trial of the aforementioned offenses.

Respectfully submitted,

/s/_____
Sharon Rogers, Petitioner
P.O. Box 490
New Martinsville, West
Virginia 26511

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of July, 1978, the following order was made and entered, to-wit:

State of West Virginia ex rel. Sharon Rogers

vs. Prohibition

Francis Lough, Magistrate, Wetzel County, West Virginia

This day came the relator, Sharon Rogers, pro se, and presented to the Court her motion in writing to stay the execution of the judgment of this Court entered July 10, 1978, denying relator's petition for a rule in prohibition, for a period of ninety days from the end of the present term, pending an application to the Supreme Court of the United States for an appeal or writ of certiorari to the judgment of this Court, pursuant to the provisions of Chapter 58, Article 5, Section 31, of the Code of West Virginia.

Upon consideration whereof, the Court is of opinion to and doth grant said motion. It is therefore considered and ordered that the execution of the judgment entered on July 10, 1978, be suspended for a period of ninety days from the end of this term of court, in order to permit the aforesaid relator to apply to the Supreme Court of the United States for an

App. E

appeal or writ of certiorari. Justice Neely absent.

A True Copy

Attest: George W. Singleton,
Clerk Supreme Court of Appeals

by: s/ Barbara M. Mellace
Administrative Assistant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-623

SHARON ROGERS,

Petitioner,

v.

FRANCIS LOUGH, Magistrate for
Wetzel County, West Virginia

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of
Appeals of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

Cases Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-623

SHARON ROGERS,

Petitioner.

v.

FRANCIS LOUGH, Magistrate for Wetzel County, West Virginia,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Francis Lough, Magistrate of Wetzel County, West Virginia, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of Appeals of West Virginia's order in this case. That order is unreported.

QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari where there exists a nonfederal question relevant to the constitutional issue raised in the petition which has not been considered or resolved by a state's highest court?

2. Whether the record before this Court is adequate to present the facts necessary for a determination of the issues presented?

3. Whether the rule of *North* v. *Russell*, 427 U.S. 328, 49 L. Ed. 2d 534, 96 S. Ct. 2709 (1976), which holds that a criminal defendant is not deprived of liberty without due process of law or effective assistance of counsel by a first trier before a lay judge when the defendant can painlessly obtain trial *de novo* before a lawyer judge by standing mute or pleading guilty, extends as well to state which require the defendant to enter a plea of not guilty in order to obtain the right to trial *de novo* before a lawyer judge?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Six and Fourteen. Chapter 50, Article 1, Section 4; Chapter 50, Article 5, Section 13; Chapter 50, Article 4, Section 3, of the West Virginia Code of 1931, as amended.

REASONS WHY THE WRIT SHOULD BE DENIED

1. **There exists a nonfederal question relevant to the constitutional issue raised in the petition which has not been considered or resolved by the Supreme Court of Appeals of West Virginia.**

The petitioner asserts in his petition that a defendant may not plead guilty in a magistrate court and then exercise his right to a trial *de novo* before a circuit court which is presided over by a lawyer judge. The petitioner cites the cases of *State* v. *Stone*, 101 W.Va. 53, 131 S.E. 872 (1926); *Nicely* v. *Butcher*, 81 W.Va. 247, 94 S.E. 147

(1917) and *State ex rel. Wright* v. *Boles*, 149 W.Va. 371, 141 S.E. 2d 76 (1965), in support of this position. All of the above-mentioned cases relied on the general rule that an appeal will not lie from a judgment of conviction in a criminal case rendered upon a guilty plea. None of the above-mentioned cases purported to engage in the art of statutory construction.

However, in 1976, the West Virginia Legislature enacted the following statute concerning appeals from criminal cases in magistrate courts:

> "Any person convicted of an offense in a magistrate court may appeal such conviction to circuit court by requesting such appeal within twenty days of the sentencing for such conviction. The magistrate may require the posting of bond with good security conditioned upon the appearance of the defendant as required in circuit court, but such bond may not exceed the maximum amount of any fine which could be imposed for the offense. Such bond may be upon the defendant's own recognizance. An appeal may be granted by a judge of the circuit court of the county within ninety days from the date of sentencing. The filing or granting of an appeal shall automatically stay the sentence of the magistrate. Trial in circuit court shall be de novo." Chapter 50, Article 5, Section 13, of the West Virginia Code of 1931, as amended.

The West Virginia Legislature made no distinction between a conviction which rests upon a verdict and a conviction which results from a guilty plea. It is conceivable, if not probable, that West Virginia's highest court, if called upon to interpret the above-quoted statute, would construe the term "conviction" to include both guilty verdicts and guilty pleas. The word "conviction" is of equivocal meaning, and its use in a statute presents a

question of legislative intent. *O'Neill* v. *Department of State*, 261 N.Y.S. 2d 937 (1965).

If the term "conviction" were construed to include a plea of guilty, West Virginia's two-tier court system would clearly fall within the realm of constitutionality under the cases of *Ludwig* v. *Massachusetts*, 427 U.S. 618, 49 L. Ed. 2d 732, 96 S. Ct. 2781 (1976), and *Colten* v. *Kentucky*, 407 U.S. 104, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972). It would, therefore, be premature for this Court to reach the questions set forth in the petitioner's petition for certiorari.

2. **The record before this Court is not adequate to present the facts necessary for a determination of the issues presented.**

The record before this Court consists of a warrant (Petitioner's Appendix C), a petition for a writ of prohibition (Petitioner's Appendix D), an order from the Supreme Court of Appeals of West Virginia denying the petition (Petitioner's Appendix A), and an order of the Supreme Court of Appeals granting a motion for a stay of execution (Petitioner's Appendix E). None of these aforementioned documents provide this Court with the facts necessary to decide the ultimate issue of whether West Virginia's two-tier trial system is constitutional.

There is an absence of facts concerning three separate crucial elements of the petitioner's claim. First is the lack of supportive facts of the alleged adverse consequences which flow from a trial before a lay magistrate. Petitioner has never been tried nor convicted of the charges pending against her. It is impossible to ascertain whether she received a fair trial before the respondent and whether, as alleged, that trial would be a useless exercise. More importantly, there are no facts to document the alleged financial, emotional and temporal burdens which the petitioner claims are the necessary result of West Virginia's two-tiered system. Any attempt to assess these burdens rest on mere conjecture.

Secondly, the record does not include information concerning the mandatory training programs of the magistrates in West Virginia other than that set forth in West Virginia Code, 50-1-4. More particularly, the educational background and training of this respondent has not been set forth.

Thirdly, there is no discussion concerning the effect at the two-tier system on the overall administration of justice in West Virginia. For example, there is no evidence of whether there is a greater delay in obtaining a hearing before a lawyer judge if West Virginia would abandon its two-tier system.

The respondent contends that these and other salient facts are essential for this Court to properly determine the issue presented. Taking into consideration the inadequate record, certiorari would be improvident and should not be granted.

3. **The issues presented have been decided by this Court.**

The petitioner asserts that the constitutionality of the two-tier trial system of West Virginia has not been addressed by prior decisions of this Court. Respondent contends that the recent decisions of *North* v. *Russell*, 427 U.S. 328 (1976), and *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976), implicitly affirm the constitutionality of West Virginia's system.

Petitioner claims that the West Virginia system is constitutionally suspect because a misdemeanor defendant is tried by a nonlawyer judge in magistrate court before he has the opportunity for a trial *de novo* before a lawyer judge in a circuit court. This was the very issue presented in the case of *North* v. *Russell*, 427 U.S. 328 (1976). In *North*, this Court sustained the Kentucky system, which like West Virginia, had a first tier of lay judges for misdemeanors, from a Sixth and Fourteenth Amendment attack. In *Ludwig* v. *Massachusetts*,

427 U.S. 618 (1976), this Court upheld the Massachusetts sytem in which a defendant was denied a jury trial in the first level. As petitioner admits in her petition, the *North* and *Ludwig* decisions, when read together, stand for the proposition that all constitutional rights need not be observed in the lower-level courts as long as these rights are accorded defendants in the upper-level courts.

However, the petitioner interprets these cases as holding that the defendant has a right to painless access to those constitutional rights at the second tier. Petitioner attempts to distinguish the *North* and *Ludwig* decision by alleging that West Virginia's system does not allow for this painless access. This allegation is based on the premise that West Virginia law does not permit an appeal from a guilty plea. As previously stated in respondent's first argument, it is unclear as a matter of West Virginia law whether an appeal after a guilty plea is permissible. Assuming arguendo that such an appeal is forbidden, the respondent contends that this is not a constitutionally significant distinction.

The respondent maintains that the *North* and *Ludwig* decisions mandate only that no system impose an impermissible infringement on the right to a lawyer judge. Whether the infringement is too great a burden must be viewed in the context of West Virginia's system. According to West Virginia Code, 50-4-3, any defendant in a magistrate court which faces a possible sentence of confinement must be informed of his right to counsel and his right to have counsel appointed if such defendant cannot afford to retain counsel. Therefore, each defendant will be adequately informed of the procedure necessary to obtain a trial *de novo*. Moreover, contrary to petitioner's assertion that the defendant may not stand mute, the defendant is under no obligation to present any defense on his own behalf in order to obtain a trial *de novo*.

The necessity of not pleading guilty in the context of the

other safeguards afforded the defendant is not an impermissible burden on the right to a trial before a lawyer judge. The Supreme Court of Washington, in *Young* v. *Konz*, 558 P. 2d 791 (1977), when faced with this precise issue, ruled that the inability to appeal from a guilty plea is not inconsistent with the holding of *North* v. *Russell*, *supra*. The respondent submits that the prior holdings of this Court have already decided the issue presented and urge that certiorari not be granted for that reason.

CONCLUSION

For the foregoing reasons, respondent submits that the Petition for Writ of Certiorari should be denied and that the order of the Supreme Court of Appeals of the State of West Virginia should thereby be affirmed.

Respectively submitted,

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By Counsel

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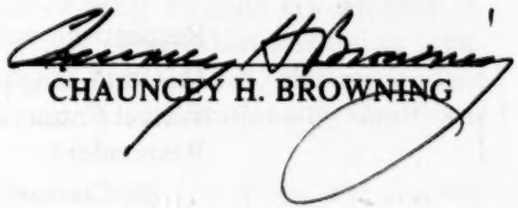
CERTIFICATE OF SERVICE

I, Chauncey H. Browning, one of counsel for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8 day of January, 1979, I served three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on the petitioner by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the petitioner Michael E. Geltner and Larry J. Ritchie, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001. I further certify that all parties required to be served have been served.



CHAUNCEY H. BROWNING

APPENDIX A

§ 50-1-4. Qualifications of magistrates; training; oath; continuing education; time devoted to public duties.

Each magistrate shall be at least twenty-one years of age, shall have a high school education or its equivalent, shall not have been convicted of any felony or any misdemeanor involving moral turpitude and shall reside in the county of his election. No magistrate shall be a member of the immediate family of any other magistrate in the county. In the event more than one member of an immediate family shall be elected in a county, only the member receiving the highest number of votes shall be eligible to serve. For purposes of this section, immediate family means the relationship of mother, father, sister, brother, child or spouse. Notwithstanding the foregoing provisions of this section, each person who held the office of justice of the peace on the fifth day of November, one thousand nine hundred seventy-four, and who served in or performed the functions of such office for at least one year immediately prior thereto shall be deemed qualified to run for the office of magistrate in the county of his residence.

No person shall assume the duties of magistrate unless he shall have first attended and completed a course of instruction in rudimentary principles of law and procedure which shall be given between the date of election and the beginning of the magistrate's term in accordance with the supervisory rules of the supreme court of appeals.

All magistrates shall be required to attend such other courses of continuing educational instruction as may be required by supervisory rule of the supreme court of appeals. Failure to attend such courses of continuing educational instruction without good cause shall constitute neglect of duty. Such courses shall be provided at least once every other year. Persons attending such courses

outside of the county of their residence shall be reimbursed by the State for expenses actually incurred not to exceed thirty-five dollars per day and for travel expenses at the rate of fifteen cents per mile for one round trip.

Each magistrate shall, before assuming the duties of office, take an oath of office to be administered by the circuit judge of the county, or the chief judge thereof if there is more than one judge of the circuit court. Each magistrate shall maintain the qualifications for office at all times.

Each magistrate who serves five thousand or less in population shall devote such time to his public duties as shall be required by rule or regulation of the judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court. Each magistrate who serves more than five thousand in population shall devote full time to his public duties. As nearly as practicable the work load and the total number of hours required shall be divided evenly among the magistrates in a county by such judge. (1976, c. 33.)

§ 50-2-3. Criminal jurisdiction.

In addition to jurisdiction granted elsewhere to magistrate courts or a justice of the peace, magistrate courts shall have jurisdiction of all misdemeanor offenses committed in the county and to conduct preliminary examinations on warrants charging felonies committed within the county. A magistrate shall have the authority to issue arrest warrants in all criminal matters, to issue warrants for search and seizure and, except in cases involving capital offenses, to set and admit to bail.

Magistrate courts shall have the jurisdiction of violations of subsection (c), section four hundred one [§ 60A-4-401], article four, chapter sixty-A of this Code under the provisions of section four hundred seven [§ 60A-4-407] of such article, and may discharge the defendant under the provisions of section four hundred seven of said article

four. The exercise of such jurisdiction shall not preclude the right of the accused to petition the circuit court of the county for probation under the provisions of section four [§ 62-12-4], article twelve, chapter sixty-two of this Code. (1976, c. 33.)

§ 50-4-3. Appointment of counsel in criminal proceeding.

In any criminal proceeding in a magistrate court in which the applicable statutes authorize a sentence of confinement the magistrate shall forthwith advise a defendant of his right to counsel and his right to have counsel appointed if such defendant cannot afford to retain counsel. In the event a defendant requests that counsel be appointed and executes an affidavit that he is unable to afford counsel, the magistrate shall stay further proceedings and shall request the judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court, to appoint counsel. Such judge shall thereupon appoint counsel. If there is no judge sitting in the county at the time of the request then the clerk of the circuit court shall appoint counsel from a list of attorneys in accordance with the rules established by such judge of the circuit court. Counsel shall be paid for his services and expenses in accordance with the provisions of article eleven [§ 51-11-1 et seq.], chapter fifty-one of this Code. (1976, c. 33; 1977, c. 82.)

§ 50-5-13. Appeals in criminal cases.

Any person convicted of an offense in a magistrate court may appeal such conviction to circuit court by requesting such appeal within twenty days of the sentencing for such conviction. The magistrate may require the posting of bond with good security conditioned upon the appearance of the defendant as required in circuit court, but such bond may not exceed the maximum amount of any fine

which could be imposed for the offense. Such bond may be upon the defendant's own recognizance. An appeal may be granted by a judge of the circuit court of the county within ninety days from the date of sentencing. The filing or granting of an appeal shall automatically stay the sentence of the magistrate. Trial in circuit court shall be de novo. (1976, c. 33.)